

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 30, 2004 Session

**STATE OF TENNESSEE, DEPARTMENT OF
CHILDREN'S SERVICES v. J.M.F.**

**Appeal from the Juvenile Court for Bradley County
No. 8512-J C. Van Deacon, Judge**

No. E2003-03081-COA-R3-PT - FILED JANUARY 11, 2005

This appeal involves the Juvenile Court's termination of the parental rights of J.M.F ("Father") to his two children, B.J.F. and S.D.F. The Juvenile Court held there was clear and convincing evidence that Father had abandoned the children, that Father had failed to substantially comply with the terms of his permanency plans, and that the conditions present at the time the children were removed had not been remedied and it was unlikely these conditions would be remedied in the near future. The Juvenile Court further held that Father's parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6). Finally, the Juvenile Court concluded there was clear and convincing evidence that termination of Father's parental rights was in the children's best interest. We affirm the judgment of the Juvenile Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Juvenile Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Rodney Craig Miller, Cleveland, Tennessee, for the Appellant J.M.F.

Paul G. Summers, Attorney General and Reporter, and Kate Eyler, Deputy Attorney General, Nashville, Tennessee, for the Appellee State of Tennessee, Department of Children's Services.

OPINION

Background

This is an appeal from the Juvenile Court's final judgment terminating Father's parental rights to his two children, B.J.F. and S.D.F., currently ages ten and twelve.¹ DCS obtained temporary custody of the children on March 9, 2001, after the Juvenile Court found them to be dependent and neglected. Permanency plans soon were developed with the goal of reuniting the parents with their children. With regard to Father, the plans noted that the children had informed DCS that they had hit Father because he was being mean to their mother. The plans also indicated that Father was incarcerated in 1999 for felony possession of cocaine. Father later was released on parole but returned to prison after he violated his curfew and tested positive for drugs. According to the plans, Father again was released from prison on parole in February of 2001, shortly before DCS obtained temporary custody of the children.

The permanency plans required Father to attend certain specified meetings, obtain a psycho-social assessment, and undergo counseling. The plans further required Father to complete an alcohol and drug assessment, continue with any recommended treatment, and to abide by all rules or requirements of his probation officer or the courts. Father also was required to attend parenting classes and obtain employment. The permanency plans were ratified by the Juvenile Court in May of 2001.

There was very little activity in this case between March of 2001 and March of 2003, at least insofar as Father's case was concerned. The Juvenile Court did enter an order in March of 2001 requiring Father to pay child support in the amount of \$17.50 per week for each child, or a total of \$35 per week. In July of 2001, DCS filed two petitions for contempt claiming Father was in arrears a total of \$595. On April 22, 2002, DCS sent a periodic update to the Juvenile Court which stated that Father was in the Monroe County jail awaiting sentencing on violation of parole and drug charges.

On March 31, 2003, DCS filed a petition seeking to terminate Father's parental rights. In this petition, DCS claimed, among other things, that: 1) the children had been removed from the home for at least six months and the conditions which led to their removal persisted; 2) there was little likelihood that these conditions would be remedied at an early date which would permit a safe return of the children to Father; 3) continuation of the parent/child relationship would greatly diminish the children's chances of early integration into a safe, stable and permanent home; and 4) Father had failed to effect a lasting adjustment after reasonable efforts by social agencies for such a duration of time that a lasting adjustment did not appear possible. DCS further alleged that Father "has never worked a plan toward reunification," and that Father had abandoned the children as that

¹ The Juvenile Court also terminated the parental rights of the children's mother, but the mother has not appealed. Therefore, we will discuss the facts only as they pertain to Father.

term is defined in Tenn. Code Ann. § 36-1-102(1)(A)(iv). Finally, DCS alleged it would be in the best interests of the children for Father's parental rights to be terminated.

Father was incarcerated at the Whiteville Correctional Facility in Whiteville, Tennessee when the petition to terminate his parental rights was filed. Father was served personally with the petition at that facility. Father's attorney filed an answer to the petition generally denying the pertinent allegations contained therein.

At trial, Father testified he married the children's mother, ("S. F." or "Mother") in 1997, after both children had been born. Approximately one year later, Father was arrested for possession of drugs and incarcerated in the Monroe County jail for fourteen months. The children visited Father every Sunday and Wednesday while he was in jail. The family moved to Bradley County and Father secured employment after he was released from jail. Father and Mother were having marital problems, and they attended a marriage retreat together. On the way back from the retreat, they stopped in Sweetwater, Tennessee, which is where they had lived when Father was arrested previously. Mother dropped Father off at a friend's house and returned one hour later. Mother and Father later got into a heated argument. According to Father:

We pulled over and it's pouring down rain. I asked her to please be quiet. She gets louder and she gets louder. So I grabbed her mouth and closed up her mouth. I told her to quit arguing, and I let go. So she started again ... [and] I grabbed her mouth again and said, look, quit arguing, let's quit arguing and go home. She started back up again, and this time I grabbed her mouth and I told her, if you don't be quiet we're going to end up doing something crazy in the car, you know, it's just going to get out of hand. Let's just get out of the car and talk about this and go home. I got out of the car, and she took off. I walked up to my aunt's home and asked her to give me a ride home.

When I got home the following day, I was violated for a curfew, and that's when I went to prison.

Father then was returned to prison for approximately one year, from February 16, 2000, to February 6, 2001. Father testified that he reflected on various matters while in prison. Father decided "to get out and be involved in my children's life. I did not want them to have the life that I had." During the last six months Father was in prison that time, he did not receive any visits from the children because Mother had obtained a restraining order. In addition, because of the restraining order Father did not reside with Mother and the children after he was released from prison. Father testified that he, nevertheless, spent as much time as possible with the children engaging in various recreational activities. The time Father was spending with his children for the most part ended on March 9, 2001, the date Father describes as when his "whole world was

destroyed.” On that date, DCS obtained temporary custody of the children. Once the children were in DCS custody, Father was able to visit with the children only once every other week.

Father was questioned at trial about his efforts, or lack thereof, at completing the various requirements of the permanency plans. Father testified:

I made every effort during that time to see my children. There were a lot of things that I would not do as far as what DCS asked me because I was really pissed off at the time. I didn’t want to comply with nothing. They took my children from me. They took my heart from me. You took my dream and my hope and you expect me to bow down to this. So I did not comply with anything except visitation to see my children.... But after about a month or two I did start complying to their rules. I did start going to parenting classes, and I was one session away from completing that class. The reason I did not complete it was because I was arrested.

Father again was arrested on June 14, 2001, for possession of cocaine, possession of marijuana, and resisting arrest. Father pled guilty to possession of marijuana and the remaining charges were dismissed. Father was placed on probation for 364 days and fined \$500. Less than two months later, Father once more was arrested for possession of cocaine. Father remained in jail and over one year later he was found guilty of possession of cocaine. Father was sentenced to eight years in prison, although he was given credit for one year and eighteen days of time served. Father has five years remaining on his sentence although he could be paroled early. Father admitted on cross-examination that he had received a ten year prison sentence on April 29, 1999, for possession of cocaine with intent to sell. Father admitted at trial that he had not seen his children for two and one-half years because of his incarceration. He claimed, however, that he has requested to see them through DCS but has never received any response.

Father testified that when he was living with Mother and the children, he would do illegal drugs three or four days a week, but he never took the drugs at home. According to Father, “I did not mix my street life and my family life together.” Father admitted his “street life” also involved beating police officers as well as people who owed him money but were unable to pay.

Based on various exhibits admitted at trial, a summary of Father’s criminal convictions are as follows:

- ! On April 22, 1999, Father pled guilty to simple possession of marijuana, a class A misdemeanor. Father was sentenced to 11 months and 29 days in jail and fined \$250.
- ! On April 22, 1999, Father pled guilty to possession of over .5 grams of cocaine for resale, a class B felony. Father was sentenced to ten years in prison and fined \$40,000.

- ! On June 21, 1999, Father pled guilty to two counts of selling and delivering cocaine in an amount less than .5 grams, a class C felony. Father was sentenced to two six year prison terms and fined a total of \$4,000.²
- ! On June 21, 1999, Father pled guilty to conspiracy to sell cocaine, a class D felony. Father was sentenced to two years in prison.
- ! On June 21, 1999, Father pled guilty to the casual exchange of marijuana, a class A misdemeanor. Father was sentenced to 11 months and 29 days in jail and fined \$250.
- ! On June 15, 2001, Father pled guilty to possession of marijuana, was fined \$500, and placed on probation for 364 days.
- ! On August 21, 2002, Father was found guilty of possession of cocaine for resale, a class B felony. Father was sentenced to eight years in prison but given credit for time served of one year and eighteen days. Father was fined \$3,000 and found to be in violation of probation.

Debbie Mayer (“Mayer”), a DCS caseworker, testified that to her knowledge, Father had not completed any of the requirements of the permanency plan. Because Father’s testimony is consistent with Mayer’s testimony, we need not summarize Mayer’s testimony further in order to resolve the specific issues presented for review.

There were numerous exhibits admitted at trial, including literally hundreds of pages of documents pertaining to the two children. While we will not summarize these voluminous documents as they are not relevant to the issues before us on appeal, suffice it to say that both of these children have extreme emotional and behavioral problems, often culminating in violence. Most of these records are from counselors and therapists who have tried to address the children’s numerous and ongoing problems.

After the trial was completed, the Juvenile Court issued its findings of fact and conclusions of law. Specifically, the Juvenile Court concluded there was clear and convincing evidence that: (1) DCS had engaged in reasonable efforts to prevent removal of the children and, thereafter, to assist Father with the reunification process; (2) Father’s parental rights should be terminated pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(ii) in that “there has been actual and technical abandonment” of the children by Father; (3) Father’s parental rights should be terminated because he failed to substantially comply with the terms of the permanency plans; (4) grounds for termination of Father’s parental rights also existed pursuant to Tenn. Code Ann. § 36-1-113(g)(3) in that the children have been removed from the home in excess of six months and the conditions leading to their removal still persisted; (5) grounds for termination of Father’s parental rights also existed under Tenn. Code Ann. § 36-1-113(g)(6) because Father was incarcerated under

² Some of the sentences were served concurrently with others.

a ten year sentence and the children were under the age of eight years when the sentence was imposed; and (6) termination of Father's parental rights was in the best interest of the children.

Father appeals claiming the Juvenile Court erred when it concluded he had abandoned the children. Father also claims the Juvenile Court erred when it granted during trial the State's oral motion to amend the petition to terminate Father's parental rights by adding as an additional ground that Father's parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6). Finally, Father claims the Juvenile Court erred when it concluded that termination of Father's parental rights was in the best interest of the children.

Discussion

The factual findings of the Juvenile Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). In *In re Adoption of T.A.M.*, No. M2003-02247-COA-R3-PT, 2004 Tenn. App. LEXIS 317 (Tenn. Ct. App. May 12, 2004), *no appl perm appeal filed*, this Court observed that:

Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. *Jones v. Garrett*, 92 S.W.3d at 838; *In re Valentine*, 79 S.W.3d at 546; *Ray v. Ray*, 83 S.W.3d at 733; *In re L.S.W.*, 2001 Tenn. App. LEXIS 659, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *5 (Tenn. Ct. App. Sept. 6, 2001), *perm. app. denied* (Tenn. Dec. 27, 2001).

In re Adoption of T.A.M., 2004 Tenn. App. LEXIS 317, at ** 8-9 (footnote omitted).

In *Dep't of Children's Servs. v. D.G.S.L.*, this Court discussed the relevant burden of proof in cases involving termination of parental rights. Specifically, we observed:

It is well established that "parents have a fundamental right to the care, custody, and control of their children." *In re Drinnon*, 776

S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). "However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

Termination of parental or guardianship rights must be based upon a finding by the court that: (1) the grounds for termination of parental or guardianship rights have been established by clear and convincing evidence; and (2) termination of the parent's or guardian's rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c). Before a parent's rights can be terminated, it must be shown that the parent is unfit or substantial harm to the child will result if parental rights are not terminated. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Similarly, before the court may inquire as to whether termination of parental rights is in the best interests of the child, the court must first determine that the grounds for termination have been established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)....

Dep't of Children's Servs. v. D.G.S.L., No. E2001-00742-COA-R3-JV, 2001 Tenn. App. LEXIS 941, at **16-17 (Tenn. Ct. App. Dec. 28, 2001), *no appl. perm. appeal filed*.

Termination of parental rights may be based upon a number of statutory grounds. The statutory provisions relied upon by the Juvenile Court provide that parental rights can be terminated for the following reasons:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore,

prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

* * * *

(6) The parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court.

Tenn. Code Ann. §§ 36-1-113(g)(1) through (g)(3) and (g)(6) (Supp. 2004).

As relevant to this appeal, Tenn. Code Ann. § 36-1-102(1)(A)(ii) defines abandonment as follows:

The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date.

In the present case, the Juvenile Court found there was clear and convincing evidence that the statutory grounds for termination in Tenn. Code Ann. §§ 36-1-113(g)(1) through (g)(3) and

(g)(6) had been met. Clear and convincing evidence supporting any single ground will support a termination order. See *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

We first will discuss the Juvenile Court's conclusion that Father had abandoned the children. The recent case of *In re: DNG*, No. M2003-02810-COA-R3-CV, 2004 Tenn. App. LEXIS 668 (Tenn. Ct. App. Oct. 13, 2004), *no appl. perm. appeal filed*, was a parental rights termination case where DCS alleged, among other things, that the mother had abandoned her child pursuant to Tenn. Code Ann. § 36-1-102(1)(A)(iv). That statutory section defines abandonment as follows:

A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the child[.]

The facts in *DNG* involved a mother who repeatedly was in and out of jail because of drug convictions. The trial court concluded that the mother's illegal conduct constituted abandonment because it showed a wanton disregard for the child's welfare. In affirming the judgment of the trial court, this Court stated:

Our courts have consistently held that an incarcerated parent who has multiple drug offenses and wastes the opportunity to rehabilitate themselves by continuing to abuse drugs, resulting in revocation of their parole and reincarceration, constitutes abandonment of the child, and demonstrates a wanton disregard for the welfare of the child. *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000); *State Dep't of Children's Servs. v. J.S.*, 2001 Tenn. App. Lexis 796 (Tenn. Ct. App. 2001); *G.M.C. et al v. A.V.I.*, 2000 WL 1195686 (Tenn. Ct. App. 2000); *State v. D.G.S.L.*, 2001 Tenn. App. Lexis 941 (Tenn. Ct. App. 2001); *State v. Grant*, 2002 Tenn. App. Lexis 158 (Tenn. Ct. App. 2002); *Dept. Of Children's Serv. v. Wiley*, 1999 Tenn. App. Lexis 773, 1999 WL 1068726 at *7 (Tenn. Ct. App. 1999). Cf. *In re C.T.S.*, 2004 Tenn. App. Lexis 552, 2004 WL 1838441 (Tenn. Ct. App., Aug. 16, 2004); (the Court found the fact that the mother ingested crack cocaine during pregnancy was conduct that itself established a wanton disregard for the welfare of the child.)....

* * * *

[The mother's] defense was that she was now dealing with things "differently". In parental rights matters, the court does not look to the protestations of affections and expressed intentions of the parent, but rather the parent's course of conduct. *Koivu v. Irwin*, 721 S.W.2d 803 (Tenn. Ct. App. 1986); *Fancher v. Mann*, 58 Tenn. App. 471, 432 S.W.2d 63, 65 (Tenn. Ct. App. 1968).

DNG, 2004 Tenn. App. LEXIS 668, at **5, 6.

DNG involved abandonment as that term is defined in Tenn. Code Ann. § 36-1-102(1)(A)(iv), while here the Juvenile Court relied on abandonment as defined in Tenn. Code Ann. § 36-1-102(1)(A)(ii), *supra*. The facts in the present case show that the children were removed from the home on March 9, 2001. Permanency plans were developed and Father was informed of what actions he needed to take to have the children returned to his care. Father admittedly did not do what was required of him and failed to complete any of the plan's requirements except visit with the children. Except for visiting with the children, the only other thing we are certain Father did do was possess and ingest illegal drugs. On June 14, 2001, Father was arrested for possession of cocaine, possession of marijuana, and resisting arrest. In a compromise plea, the charges for possession of cocaine and resisting arrest were dismissed and Father pled guilty to possession of marijuana, was fined \$500, and placed on probation for 364 days. On August 3, 2001, Father was charged with possession of cocaine for resale. Father remained in jail on this charge until August 21, 2002, at which time he was found guilty. Father was sentenced to eight years in prison and given credit for time served of one year and eighteen days. Although we are uncertain why the Juvenile Court did not rely on the definition of abandonment contained in § 36-1-102(1)(A)(iv) as plead by DCS, we nevertheless believe there is clear and convincing evidence that all of the elements of abandonment as defined in both § 36-1-102(1)(A)(ii) and (iv) have been met. In particular, Father has made no reasonable effort to provide a suitable home for the children and has demonstrated a lack of concern for the children to such a degree that it appears unlikely that he will be able to provide a suitable home for the children at an early date. Further, it is clear that Father by continuing to abuse drugs resulting in revocation of his parole, new convictions, and his reincarceration demonstrated a wanton disregard for the welfare of the children and his actions constituted abandonment of the children. The judgment of the Juvenile Court finding clear and convincing evidence that Father abandoned the children pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1) and 36-1-102(1)(A)(ii) is affirmed.

We next address whether Father's parental rights were properly terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(2) because of his substantial noncompliance with the terms of the permanency plans. We first note that Father neither raises as an issue nor argues in his appellate brief that the Juvenile Court erred in finding that he failed to substantially comply with terms of the permanency plans. Father admitted at trial that he did not complete any of the requirements of the plan, except for visiting with the children. Instead of having an alcohol and drug assessment and taking steps to remain drug free, Father continued to use illegal drugs and was arrested within a few

months. There were many other requirements Father failed even to attempt, much less complete. The DCS caseworker testified Father had not completed any of the requirements of the permanency plan. In light of the foregoing, we easily conclude that even if Father had raised this issue, there was clear and convincing evidence to terminate Father's parental rights for substantial noncompliance with the terms of the permanency plans. These same facts also support the Juvenile Court's conclusion that the conditions which led to the removal of the children or other conditions which would cause the children to be subjected to continuing abuse or neglect still persisted, that there was little likelihood that these conditions would be remedied at an early date, and that continuation of the parent/child relationship would greatly diminish the children's chances of integration into a safe and stable environment.

Having affirmed the Juvenile Court's conclusion that DCS proved by clear and convincing evidence that Father's parental rights should be terminated pursuant to Tenn. Code Ann. §§ 36-1-113(g)(1), (g)(2), and (g)(3), the next issue is whether Father's parental rights also were terminated properly pursuant to § 36-1-113(g)(6). As noted previously, the Juvenile Court granted an oral motion made by DCS during the trial to amend its petition to allege this statutory subsection as an additional ground sufficient to terminate Father's parental rights. Father claims the Juvenile Court abused its discretion in allowing the amendment. Tenn. R. Civ. P. 15.02 provides:

Amendments to Conform to the Evidence. – When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. Provided, however, amendment after verdict so as to increase the amount sued for in the action shall not be permitted. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Father acknowledges that the Juvenile Court's ruling on this issue was discretionary and that this Court will not overturn that determination unless there is a clear abuse of discretion. *See, e.g., McKinney v. Educator & Executive Insurers, Inc.*, 569 S.W.2d 829, 833 (Tenn. Ct. App. 1977). In *Huntington Nat. Bank v. Hooker*, 840 S.W.2d 916 (Tenn. Ct. App. 1991), in discussing Rule 15.01 we noted that:

Rule 15.01 provides that leave (to amend) shall be freely given when justice so requires. This proviso in the rules substantially lessens the exercise of pre-trial discretion on the part of a trial judge. Indeed, the statute ... which conferred a measure of discretion on trial judges was repealed and Rule 15 stands in its place and stead. That rule needs no construction; it means precisely what it says, that "leave shall be freely given."

Id. at 923 (quoting *Caruthers' History of a Lawsuit*, at 91-92 (8th ed. 1963)).

While the present case involves Rule 15.02 as opposed to Rule 15.01, we believe the same rationale applies here. DCS made the oral motion to amend the pleadings to conform to the evidence after the trial was underway but prior to Father presenting his case. Father's primary objection to the amendment was that DCS had plenty of time to amend the petition prior to trial. While this was a relevant factor for the Juvenile Court to consider when ruling on the motion, we conclude that the Juvenile Court did not abuse its discretion for that reason standing alone. We are convinced from our review of the record that the presentation of the merits of the case was served by the granting of the amendment. Furthermore, Father does not explain how he was prejudiced by the Juvenile Court's granting of the amendment or why he did not seek a continuance if such prejudice indeed existed.

Parental rights can be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(6) by showing: (1) that the parent has been confined in a correctional or detention facility by order of the court as a result of a criminal act; (2) the parent is under a sentence of ten or more years; and (3) the child was under eight years of age when the sentence was entered by the court. Father does not argue on appeal that these elements are not present in this case. We hold that the Juvenile Court did not abuse its discretion in allowing DCS to amend its petition, and that there was clear and convincing evidence to support termination of Father's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(6).

Having affirmed the Juvenile Court's decision that four grounds existed to terminate Father's parental rights, we now turn to whether termination of Father's parental rights was in the best interest of the children. Tenn. Code Ann. § 36-1-113(i) describes the standard for determining whether termination is in the best interests of the child in such cases:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (Supp. 2004).

Since the best interest determination requires a separate analysis, the existence of grounds to terminate parental rights does not automatically mean that termination of parental rights is in the best interest of the child. *See e.g., In re D.I.S.*, No. W2000-00061-COA-R3-CV, 2001 Tenn. App. LEXIS 358 (Tenn. Ct. App. May 17, 2001), *no appl. perm. appeal filed*.

Father takes issue with the Trial Court's conclusion that there was no meaningful relationship between Father and the children. Not surprisingly, at trial Father testified that a meaningful relationship did exist between him and the children. In direct contrast to this assertion, there was substantial evidence admitted at trial to the effect that the children were afraid of Father. One of the many examples is a drawing made by one of the children. In this drawing, the child drew himself holding a knife up in the air after having just stabbed Father to death. The drawing states "my dad is dead" and "I'm safe and I'm free." After reviewing all of the relevant factors, we conclude there was clear and convincing evidence to support the Juvenile Court's conclusion that termination of Father's parental rights was in the best interest of the children.

Conclusion

The judgment of the Juvenile Court is affirmed and this cause is remanded to the Juvenile Court for collection of the costs below. Costs on appeal are assessed against the Appellant, J.M.F. and his surety, if any.

D. MICHAEL SWINEY, JUDGE